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Supreme Court of the United States

OCTOBER TERM, 1954

No. 595

DONALD JACKSON DE MOSS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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No.

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Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit affirming the judgment of the United States District Court for the Southern District of Iowa, Central Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is printed as Appendix A to this petition (pages 18-30, *infra*). The opinion of the trial court appears in the record. [R. 60-65]

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 29, 1954. (See Appendix B of this petition, page 31, *infra.*) A petition for rehearing was filed on January 10, 1955. This petition was denied on January 19, 1955. (See Appendix C of this petition, page 32, *infra.*) The time for filing this petition for writ of certiorari expires February 18, 1955. This petition for writ of certiorari is filed within the time. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). (See, also, Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.) The district court had jurisdiction under 18 U. S. C. § 3231.

QUESTIONS PRESENTED

I.

Whether there was no basis in fact for the denial of the conscientious objector claim by the appeal board, making the final I-A classification arbitrary and capricious.

II.

Whether petitioner was denied illegally a Department of Justice investigation, hearing and recommendation on his claim for classification as a conscientious objector, contrary to Section 6(j) of the act.

III.

Whether Section 1626.25 of the amended regulations (Executive Order No. 10,363, Vol. 17, Federal Register No. 119, June 18, 1952, pp. 5449-5452), eliminating the Department of Justice procedure where an appeal is taken

from a conscientious objector classification, is contrary to the act because of the reenactment of the law on two occasions with an outstanding administrative interpretation through the old regulations requiring such procedure in cases like this.

STATUTES AND REGULATIONS INVOLVED

Section 1(c) of the Act

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451(c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the Act

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found

to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of Section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under

this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.—50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86.

Section 12(a) of the Act

Section 12(a) of the act (50 U. S. C. App. § 462(a), 62 Stat. 622) provides:

". . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

Section 1622.1(d) of the Regulations

Section 1622.1(d) of the Selective Service Regulations (32 C. F. R. § 1622.1(d) (E. O. 9988, 13 F. R. 4853; E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides:

"(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each such registrant shall receive equal justice."

Section 1622.14(a) of the Regulations

Section 1622.14(a) of the Selective Service Regulations (32 C. F. R. § 1622.14(a) (E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides:

"Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces."

Sections 1626.25 and 1626.26 of the regulations, concerning the reference of the case to the Department of Justice, are quoted in full in the discussion of the reasons as to why the writ should be granted, *infra*, at pages 11-16.

STATEMENT OF THE CASE

Petitioner was charged with violating the Universal Military Training and Service Act (50 U. S. C. App. § 462). [R. 1-2] Evidence was received, followed by the motion for judgment of acquittal. [R. 58] The motion was denied. [R. 59] The trial court wrote an opinion giving some reasons why the motion should be denied, and found the petitioner guilty. [R. 60-75]

Donald Jackson DeMoss, petitioner, was born on November 24, 1932. [R. 13] He was mailed his classification questionnaire on November 1, 1951. [R. 15] The questionnaire was properly filed on November 14, 1951. [R. 15]

The questionnaire contained his proper name and address. [R. 15] DeMoss answered Series VI and said that he had been a minister of Jehovah's Witnesses since April 5, 1941. [R. 16] He showed that he worked on a farm. He stated that he was "a necessary hand on this farm as father can not manage it alone. He has not other help. We operate 320 acres." [R. 17] He showed that he had finished

3 years of high school and expected to graduate. [R. 17] He signed series XIV certifying that he was conscientiously opposed to participation to war in any form. [R. 17]

On November 14, 1951, the local board mailed DeMoss the special form for conscientious objector. He filled this out and returned it to the local board on November 20, 1951. The form showed that he was opposed to combatant and noncombatant military service. The form showed that he was a conscientious objector. He based his belief against military service on belief in the Supreme Being. [R. 20] He showed that he had acquired his belief as a result of his religious training. [R. 20-21] He stated that he believed in self-defense. [R. 21] DeMoss cited his study of the Bible and his activity as one of Jehovah's Witnesses as conspicuously demonstrating the depth of his religious convictions. [R. 21] He gave his general background and employment. [R. 21-22]

He answered that he was a member of Jehovah's Witnesses and stated that the Watchtower Bible and Tract Society was the legal governing body of this group. He named and located his church and named the local minister. [R. 22-23] He showed that his father and mother were Jehovah's Witnesses. [R. 22-23] He attached the booklet *Loyalty* to the form. Also accompanying his answers in the Special Form for Conscientious Objector was the *Watchtower* magazine, issue of February 1, 1951, containing articles entitled "Why Jehovah's Witnesses Are Not Pacifists" and "Pacifism and Conscientious Objection—Is There a Difference?"

On January 7, 1952, the local board wrote to the state director for advice on classification. [R. 24] The state director answered that the board must be careful and avoid being influenced by personal feelings and guard against "'stigmatizing' the members of any particular religious group." [R. 25-26] The local board again wrote for comments on the proper classification of DeMoss. [R. 27] The state director advised again that the board should be fair.

He cited the regulations and stated, "In view of this, it is the opinion of this headquarters that the registrant should be classified in Class I-O." [R. 28] The I-O classification is that of a conscientious objector exempt from all military training and service. On February 18, 1952, the local board classified him in Class I-O. [R. 18] He was notified of this classification. [R. 18] He was then ordered to report for an armed forces physical examination. [R. 18, 29] He reported and was found to be fully acceptable. [R. 29-30]

DeMoss and his mother appeared before the board on March 2, 1953. They requested that he be given a minister's exemption and a change of classification to Class IV-D. This is the classification for a minister of religion. The board advised DeMoss to appeal his classification because the appeal board "had more experience handling case of this type." The local board gave DeMoss another I-O classification. [R. 19] He was mailed a new card on May 3, 1953. [R. 19] De Moss then filed with the local board a large number of affidavits corroborating his claim for classification as a minister. [R. 30, 32-37]

The chairman of the local board made a memorandum on March 23, 1953. He stated that the board "did not believe registrant was entitled to any classification other than I-O. The case was referred to the appeal agent and he stated that he had reviewed the file and thought it should be submitted to the state appeal board. [R. 39] The file was forwarded to the appeal board on March 24, 1953. [R. 19, 38] On April 28, 1953, the appeal board classified DeMoss in Class I-A. [R. 38] The file was returned to the local board on May 4, 1953. [R. 19] The clerk of the local board wrote DeMoss on May 8, 1953, that the appeal board had classified him in Class I-A. She enclosed the classification notice. [R. 41] DeMoss wrote the state director to appeal his case to the President. [R. 41-47] He requested the local board to stay his induction order. [R. 47-48] DeMoss, his mother and his sister appeared before the clerk of the board on May 20, 1953, and requested a change

of classification. [R. 48-49] This was followed by a written request by DeMoss for a reopening of his classification. [R. 49-50] On June 5, 1953, the local board denied his request for a reopening of his classification and on the same date mailed DeMoss an order to report for induction. [R. 19, 51] The order commanded him to report for induction on July 20, 1953. [R. 51] DeMoss reported on that date and refused to submit to induction [R. 54-57] The local board was notified of his refusal to submit to induction on July 22, 1953. On August 27, 1953, the local board reported DeMoss to the United States Attorney as a delinquent.

REASONS FOR GRANTING THE WRIT

I.

The decision of the court below holding that there was basis in fact is in direct conflict with the holdings in other cases decided by other courts of appeals.—See *Williams* v. *United States,* 5th Cir., 1954, 216 F. 2d 350, 351-352; *Annett* v. *United States,* 10th Cir., 1953, 205 F. 2d 689; *United States* v. *Pekarski,* 2d Cir., 1953, 207 F. 2d 930; *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329; *Jewell* v. *United States,* 6th Cir., 1953, 208 F. 2d 770; *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366; *Pine* v. *United States,* 4th Cir., 1954, 212 F. 2d 93; *Weaver* v. *United States,* 8th Cir., 1954, 210 F. 2d 815; *Jessen* v. *United States,* 10th Cir., 1954, 212 F. 2d 897; *United States* v. *Close,* 7th Cir., 1954, 215 F. 2d 339; *United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443. Compare *Clark* v. *United States,* 9th Cir., December 3, 1954, — F. 2d — ; *Pitts* v. *United States,* 9th Cir., December 7, 1954, — F. 2d — ; *Affeldt* v. *United States,* 9th Cir., December 14, 1954, — F. 2d — ; *Ashauer* v. *United States,* 9th Cir., December 21, 1954, — F. 2d — .

It is submitted, therefore, that there is a direct conflict between the holding of the court below and the holding of other courts of appeals on this question. This gives a basis for granting the writ of certiorari.

II.

Another important and substantial question of law that has not been decided by this Court and that ought to be determined by it is whether the appeal board should have written reasons for denying the conscientious objector status.

When a local board has classified a registrant as a conscientious objector and there has been no investigation and recommendation by the Department of Justice, as in this case, (*Sterrett* v. *United States,* 9th Cir., 1954, 216 F. 2d 659) it is the same as though there were a recommendation by the Department in favor of the petitioner. Then the I-A classification of the appeal board in this case is illegal because of its failure to express reasons for reversing the conscientious objector classification granted by the local board. The affirmance of the conviction in this case is in conflict with *United States* v. *Hagaman,* 3rd Cir., 1954, 213 F. 2d 86; *Ypparila* v. *United States,* 10th Cir., No. 4937, decided December 22, 1954; and *Reel* v. *Badt,* 2d Cir., 1944, 141 F. 2d 845.

III.

The holding of the court below, that there was no illegal denial of a Department of Justice procedure required by Section 6(j) of the act and that the amended regulation doing away with the investigation is valid, is in direct conflict with *Sterrett* v. *United States,* 9th Cir., 1954, 216 F. 2d 659. The holding of the court below is in irreconcilable conflict with the *Sterrett* opinion.

The court below said (page 30, *infra*): "There being no clear conflict between the regulation and the statute, the Executive Order of the President should not be stricken down by the courts." The Court of Appeals for the Ninth Circuit in *Sterrett* v. *United States, supra,* 216 F. 2d 659, said: "In view of what we here hold not only was the Department of Justice in error in refusing to hold a hearing but so much of the Regulation as would purport to deny

such a hearing to these registrants was itself unauthorized by the statute."

The Solicitor General did not apply for a writ of certiorari in the *Sterrett* case. Apparently the Solicitor General is of the opinion that the law announced by the Ninth Circuit, adopting the interpretation put upon the statute by petitioner in this case, is the law of the land. Such view apparently is in direct conflict with the view the court below has taken. Apparently also, the Solicitor General of the United States has, by refusing to apply for a writ of certiorari, disapproved the holding by Judge Ridge, relied on by the court below in *Weaver* v. *United States*, 8th Cir., 1954, 210 F. 2d 815, as was done by the Court of Appeals for the Ninth Circuit.—See footnote 7 on page 10 of the *Sterrett* opinion, 216 F. 2d 665, where the holding of Judge Ridge is condemned.

The denial of the investigation and hearing in the Department of Justice after June 17, 1952, pursuant to amended Regulation 1626.25 (executive order of the President 10,363, Volume 17, Federal Register No. 119, Wednesday, June 18, 1952, pages 5,449 to 5,452) is a denial of a full and fair hearing. The amended regulation and the executive order of the President conflict directly with Section 6 (j) of the act. The new regulation as amended reads as follows:

> "§ 1626.25. *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:
>
> "(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in combatant training

and service in the armed forces, but not conscientiously opposed to participation in noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-A-O, the appeal board shall proceed with the classification of the registrant. If in such a case, the local board has classified the registrant in any class other than Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

"(2) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, *and the local board has classified the registrant in Class I-O, the appeal board shall proceed with the classification of the registrant.* If, in such a case, the local board has classified the registrant in any class other than Class I-O, the appeal board shall transmit the entire file to the United States Attorney for the federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.—[Italics added.]

"(b) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an

opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(c) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the letter containing the recommendation of the Department of Justice."

Sections 1626.25 and 1626.26 of the regulations (32 C. F. R. § § 1626.25 and 1626.26) before the amendment on June 17, 1952, provided:

"1626.25 *Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason

of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) *If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.*—[Emphasis added.]

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that

the registrant is eligible for classification in Class I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and *any file so forwarded shall be returned, unless in the 'Minutes of Action by Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of this* section.—[Emphasis added.]

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive

months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice and the report of the hearing officer of the Department of Justice.

"1626.26. *Decision of Appeal Board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the president is taken; provided that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

The word "shall" is used in the sentence of the act commanding the inquiry and hearing. This is followed by the word "refer." Following the word "refer" are the words "any such claim." "Any such claim" means any conscientious objector claim. This would mean that if an appeal had any conscientious objector claim in it, it would be the duty of the appeal board to refer it to the Department of Justice.

If no conflict be found between the two opinions, then petitioner says that this petition presents a substantial question of law that has not been, but that should be, determined by this Court.

Without further discussion of this point the Court is referred to the entire opinion in *Sterrett* v. *United States*, 216 F. 2d 659. That opinion discusses at great length why the amended regulation approved by the court below is in direct conflict with the statute.

CONCLUSION

For the reasons above stated it is respectfully submitted that this petition for writ of certiorari should be granted.

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February, 1955.

APPENDIX A

Opinion of Court Below

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,112.

Donald Jackson DeMoss,
Appellant,

vs.

United States of America,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

[December 29, 1954.]

Hayden C. Covington for the Appellant.

Robert J. Spayde, Assistant United States Attorney (Roy L. Stephenson, United States Attorney, and John C. Stevens, Assistant United States Attorney, were with him on the brief), for Appellee.

Before Gardner, Chief Judge, Collet and Van Oosterhout, Circuit Judges.

COLLET, Circuit Judge.

Defendant was indicted, tried and convicted on a charge of refusing to submit to induction into the armed forces of the United States. He contends that he was a minister of Jehovah's Witnesses. The local draft board denied his claims as a minister but classified him as a conscientious objector. On appeal, the appeal board denied both and classified him I-A, eligible for military service. The draft board ordered his induction. He refused to be inducted. His indictment followed. The case was tried to the court without a jury.

One of the questions presented on this appeal is the same as one of those presented in *Bates* v. *United States,* 216 F.2d 130, i.e., that there was no basis in fact for the denial of the conscientious objector status by the appeal board and that the final classification was arbitrary and capricious. The other point urged is that defendant was illegally deprived of a Department of Justice investigation. The necessary facts will be stated in connection with the determination of each of the issues.

The question of when a classification may be held to be supported in fact by the record and free from falling into the category of being legally capricious or arbitrary is not subject to a general definition which will fit all cases. The most that can be done is to apply general established principles to individual cases. Those principles are stated in *United States* v. *Simmons,* 213 F.2d 901, and need not be repeated here. We note one point of disagreement with the *Simmons* case, however. The Seventh Circuit misinterprets our opinion in *Weaver* v. *United States,* 210 F.2d 815. By "affirmative evidence" as used in the *Weaver* case, we do not mean that the draft board must make an independent record in opposition to the registrant's statements and conduct, if such statements and conduct constitute a basis in fact for a conclusion that the registrant's claim of exemption was not made in good faith. The requirement of *Dickinson* v. *United States,* 346 U. S. 389, is met if the board

"finds" or discovers in the recorded "record" evidence of inconsistency or conduct which is incompatible with the registrant's sincerity. We so held in *Bates* v. *United States,* 216 F.2d 130. In the *Weaver* case we were dealing with the question of whether the record disclosed a basis in fact for the conclusion that Weaver was not opposed to "war in any form" because of the particular beliefs of his particular sect, assuming the sincerity of his expressed beliefs,—the question which arose in *Taffs* v. *United States,* 208 F.2d 329—while in *Bates* v. *United States* we were dealing with the question involved in the *Simmons* case.

The question here is whether the draft board record discloses evidence which is sufficiently incompatible with the registrant's sincerity in making his claim of exemption as to constitute a basis in fact for the conclusion that defendant's claim for exemption was not made in good faith.

The appeal which was taken for him because of his objection to his classification as a conscientious objector and denying his claim for total exemption as a minister did not waive his right to classification as a conscientious objector, although he was contending for the lower ministerial classification. *Pine* v. *United States,* 212 F.2d 93, *United States* v. *Close,* 215 F.2d 439, *United States* v. *Wilson,* 215 F.2d 443. But the appeal reopened the classification for consideration de novo. *Cox* v. *Wedemeyer,* 192 F.2d 920.

Defendant contends there is no basis in fact for the appeal board's I-A classification "because there are no facts that contradict the documentary proof submitted by the appellant." The difficulty with that position lies in the fact that the documentary evidence, submitted by defendant, was contradictory and in some respects unconvincing and subject to being deemed incredible by the draft board. The question is—was there basis in fact in those contradictions, inconsistencies and incredulous statements for the conclusion of the appeal board that defendant's claim for exemption was not made in good faith.

It was said in *Jewell* v. *United States,* 208 F.2d 770, that

"where there is no substantial evidence to support a classification made by such [draft] Board, the order is void." While in *United States* v. *Simmons,* 213 F.2d 901, 904, we find this language: "When the record discloses any evidence of whatever nature which is incompatible with the claim of exemption we may not inquire further as to the correctness of the board's order."

We do not construe the language quoted from those opinions as necessarily indicating a conflict of opinion between the Sixth and Seventh Circuits. Both, as well as all others, recognize the controlling principle announced in *Estep* v. *United States,* 327 U. S. 114, that the courts are not to weigh the evidence to determine whether the classification made by the draft boards was justified. And "justification" exists if the board's order is made in conformity with the regulations. *Estep* v. *United States,* 327 U. S. 114; *Bates* v. *United States,* 216 F.2d 130. If the order is not so made, jurisdiction is wanting. Jurisdiction is absent only when, as the courts have declared, an examination of the record discloses no proof that is incompatible with the registrant's proof of exemption. *Dickinson* v. *United States,* 346 U. S. 389. If the term "substantial evidence" as used in the *Jewell* case was used in the sense of being substantial in comparison with evidence contradictory thereto, in our opinion it would be in conflict with the express direction of the *Dickinson* case which states: "Nor will the courts apply a test of 'substantial evidence.'" But if the term is used in the sense that there need be only sufficient factual indication in the record incompatible with the registrant's claim of exemption to prevent the board's order from being legally arbitrary and capricious, the use of the terminology "substantial" harmonizes with the criterion laid down by the Supreme Court. We place the latter construction on the term where we find it in opinions dealing with this question.

We are not now dealing with the question of whether the record contains basis in fact for a denial of the registrant's claim for a ministerial status. He concedes that there was

ample record justification in fact for the board's denial of that classification. He now contends, as stated, that there was no basis in fact for the denial of his conscientious objector classification.

Defendant contends that all the inconsistencies and statements of doubtful veracity contained in the record pertained only to his claim for ministerial classification and may not be considered as having any bearing upon the sincerity of his claim for exemption as a conscientious objector or the verity of his statements relating to the latter. That argument is not sound. If there was justification in the record for the board's conclusion that defendant was not telling the truth about so important and material a matter as his ministerial qualification, there was justification for the conclusion that he was untruthful about his claim of being a conscientious objector.

Defendant stated in his questionnaire that he was born November 24, 1932, and had been a minister of Jehovah's Witnesses since April 5, 1941, when he was approximately eight and one-half years old. In the absence of indication that he was a prodigy, that would be hard to believe. He filed a sworn statement later in which he stated he had been "one of the Lord's Witnesses" since April, 1943. He submitted to the board a statement of his presiding minister in which the latter stated that defendant averaged five hours a month in ministerial work. Defendant in his own sworn statement stated that he averaged 100 hours a month in ministerial work. The presiding minister stated that in February, 1953, defendant was recognized as a student of the ministry. Defendant stated that he had been a minister since 1941, while in another statement he said he was baptized April 27, 1952, and in March, 1953, was attending a Theocratic Ministry school. A written statement of another witness for defendant stated that in March, 1953, defendant was an ordained minister of the gospel.

Upon examination of one of the members of the appeal board which made the I-A classification, the witness testi-

fied that the appeal board concluded from the record made before the local board that defendant had misrepresented the facts. The chairman of the local board testified that at the suggestion of the appeal board the local board concluded that defendant's statement that he was a minister or a ministerial student could not be accepted. No point is made on this appeal as to the propriety of the admission of this evidence, although it was objected to in the trial court. It is, of course, not the nature of proof upon which the action of the appeal board is to be evaluated by us. That proof must come from the record made before the board. It does, however, verify the rather obvious inference we draw from the record that it was upon the theory of lack of verity and sincerity that the appeal board based its classification.

As we have stated heretofore, no hard and fast rule may be laid down defining the quantum of proof necessary to prevent a classification from being arbitrary and capricious and without basis in fact. Each case must be determined on its pertinent facts. Upon the record before us we are unable to say that sufficient proof to justify the board's classification was lacking. It follows that the classification was final and conclusive.

The point now made, that the denial of an investigation and hearing by the Department of Justice was contrary to the Selective Service Act, presents the question of the validity of the President's Executive Order and the amended Selective Service Regulations.

The Act of Congress, 50 U. S. C. A. App. § 456 (j), which is involved, is as follows:

"(j) Nothing contained in this title [sections 451-470 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising

from any human relation, but does not include essentially political sociological, or philosophical views or a merely personal moral code. * * * Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections] he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purpose of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local

board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

The foregoing quoted portion of § 456 (j) as it now appears in the statute is substantially the same as it was in the 1940 Act before its re-enactment in 1948.

Prior to their amendment June 17, 1952, the Selective Service Regulations promulgated under the 1940 Act and under the present § 456 (j) provided that when there was an appeal from the local board's classification and the registrant was claiming a classification of I-A-O, opposed to combatant military service but not opposed to noncombatant military service, if the appeal board concluded he was not entitled to either that classification or a lower one it should refer the file to the Department of Justice. The regulations further provided that if the claim being made by the registrant was for a classification of I-O, conscientiously opposed to both combatant and noncombatant military service, on appeal if the appeal board found that he was not entitled to that classification or the lower totally exempt ministerial classification, the claim should be referred to the Department of Justice for hearing, investigation and report. The pertinent portions of the text of the regulations prior to their amendment are set out in the footnote.[1] Thus

[1] "1625.25. Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class

it is apparent that if the statute—§ 456 (j)—be construed as not requiring a Department of Justice investigation and report unless, as the statute says, the claim for conscientious objector status is *denied* by the local board, there was a conflict between the statute and the regulations which, prior to June 17, 1952, required a Department investigation and report when the claim for conscientious objector classification was *granted* by the local board.

On June 17, 1952, by Executive Order 10363, Vol. 17, Federal Register No. 119, June 18, 1952, the President, under authority given him by § 460 of the Universal Military Training and Service Act, 50 U.S.C.A. App. §460,[2] amended the Selective Service Regulations relating to appeals involving conscientious objector classifications by providing that if the registrant had been given the classification claimed of Class I-O by the local board, on appeal

lower than I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice." 32 CFR 1626.25, 1949 Ed.

[2] "§ 460 (b) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this title; • • • (3) • • • He shall create and establish • • • local boards • • •. • • • The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. • • •"

the appeal board should proceed with the classification, without reference to the Department of Justice.[3] It would appear that this amendment was for the purpose of eliminating the pre-existing conflict between the regulations and the Act of Congress.

But defendant contends that the amendment of the regulations conflicts with § 456 (j) of the statute, supra, and is therefore void. He contends that under the proper and logical construction of § 456 (j) it required that his case be referred to the Department of Justice by the appeal board, although the local board gave him the classification of I-O, and that the failure to do so deprived him of due process, rendering the classification made by the appeal board void.

By § 460 of the Act of Congress, supra, the President was given broad and general power to prescribe regulations governing the procedure to be followed by the local

[3] The language of the amended regulation in this respect is:

"§ 1626.25. Special Provisions When Appeal Involves Claim That Registrant is a Conscientious Objector. (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in combatant training and service in the armed forces, but not conscientiously opposed to participation in noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-A-O, the appeal board shall proceed with the classification of the registrant. If in such a case, the local board has classified the registrant in any class other than Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

"(2) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-O, the appeal board shall transmit the entire file to the United States Attorney for the federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice."

and appeal boards. Only in the event such regulations prescribed by him conflict with the Act of Congress can they be held to be invalid.

Judge Lemmon, of the District Court of California, in *United States* v. *Frank,* 114 F. Supp. 949, reached the conclusion that under § 456 (j) a conscientious objector was entitled to have his case referred to the Department of Justice on appeal, although his claim to a conscientious objector classification had been sustained by the local board. Judge Ridge, of the District Court of Missouri, reached an opposite conclusion. *Weaver* v. *United States,* 210 F.2d 815. In *Elder* v. *United States,* 202 F.2d 465, the Court of Appeals for the Ninth Circuit, in discussing another question, i.e., the necessity for a full disclosure of the report of the Federal Bureau of Investigation made in connection with a reference to the Department of Justice, took note of the statutory language—"if such claim [to conscientious objector status] is *not* sustained by the local board," the appeal board should refer the "claim" to the Department of Justice—and stated: "Only in those instances where the registrant's objections have not been sustained by the board are referrals to be made to the Department." In *United States* v. *Nugent,* 346 U. S. 1, 8, the Supreme Court, in passing upon the same question under discussion in the *Elder case,* used this language:

"Yet in this special class of cases, involving as it does difficult analyses of facts and individualized judgments, Congress directed that the assistance of the Department be made available *whenever a registrant insists that his conscientious objection claim has been misjudged by his local board.*" (Italics ours.)

The italicized words of the foregoing quotation are heavily relied upon to sustain the view that § 456 (j) should be construed to mean that *whenever* a registrant is complaining on appeal about a local board's classification, the statute contemplates a reference to the Department of Justice, although the registrant has been classified as a conscien-

tious objector by the local board. And that argument is further advanced by the practical situation presented in a case such as this one. Here the registrant was contending for a Jehovah's Witness ministerial classification, which to a Jehovah's Witness included a claim that he was conscientiously opposed to either combatant or noncombatant military service. He got the conscientious objector classification by the local board but it denied the lower ministerial classification. He protested that he was not only a conscientious objector, but that and more—a minister. The appeal board not only denied his claim for ministerial classification but took away the classification given him by the local board of a conscientious objector. However proper that action of the appeal board may be on the merits does not effectively answer the argument that the statute was intended to give a registrant the right to a Department of Justice investigation on appeal when his "claim," in this instance a claim to ministerial classification, was denied by the local board. If this precise question had been before the Supreme Court in the *Nugent* case and the above-quoted language had been used in that connection, we would be justified in upholding defendant's construction of the statute.

But the italicized language was not used in connection with a contention that the power of the President had been exceeded by him and that the Selective Service Regulation promulgated by him under congressional authority was invalid. The language of the Supreme Court in the *Nugent* case was limited to that case where a registrant was insisting that his conscientious objector claim had been misjudged and where that claim had been denied by the local board. The Government's contention, that being so limited it cannot be decisive upon the facts of this case, is sound.

The language of the statute does not conflict with the amended regulation. The opening sentence of § 456 (j) of the statute undoubtedly included defendant. It reads:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and

service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Defendant could not claim to be a minister of Jehovah's Witnesses without claiming to be "conscientiously opposed to war in any form." The latter claim, which he was making, was granted. The statute plainly says that when that claim is *denied* reference shall be made to the Department of Justice. The clear meaning of the amended regulation is that when that claim is granted, the appeal board may proceed with the classification without referral to the Department of Justice. There being no clear conflict between the regulation and the statute, the Executive Order of the President should not be stricken down by the courts.

It is not the province of the court to legislate. The exemptions provided for are matters of legislative grace. And while they may be liberally construed to accomplish the result intended, the courts may not by construction create a conflict between the Act of Congress and the procedural regulations, in order to strike down such regulations when a conflict does not clearly appear. Congress authorized the President to make the regulation in question. He made it. It is not in conflict with the statute. It became and is the law as effectively as if Congress had enacted it. The judgment is affirmed.

APPENDIX B

JUDGMENT OF COURT BELOW

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15112—September Term, 1954.
Wednesday, December 29, 1954.

Donald Jackson DeMoss,

vs.

United States of America,

Appellant,

Appeal from the United States District Court for the Southern District of Iowa.

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ORDERED AND ADJUDGED by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further ORDERED by this Court that the defendant in the said District Court, Donald Jackson DeMoss, do surrender himself to the custody of the United States Marshal for the Southern District of Iowa, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

December 29, 1954.

APPENDIX C

ORDER DENYING PETITION OF APPELLANT FOR REHEARING.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15112—September Term, 1954.
Wednesday, January 19, 1955.

Donald Jackson DeMoss,

vs.

United States of America,

Appellant,

Appeal from the United States District Court for the Southern District of Iowa.

Petition of the appellant for a rehearing in this cause has been considered by this Court, and It is now here ORDERED that the same be, and it is hereby, denied.

January 19th, 1955.

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32 C. F. R. [1954 Supp.] 1626.25 (a) (2) promulgated June 18, 1952 (Ex. Ord. 10363, 17 F. R. 5456) 3, 6, 9

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